IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1157

TOWN OF LOCKPORT, NEW YORK, and FLOYD SNYDER, Individually and as Supervisor of the Town of Lockport,
Appellants,

vs.

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC. and FRANCIS W. SHEDD, Individually and on Behalf of All Others Similarly Situated,
Appellees,

and

JOHN J. GHEZZI, Secretary of State of the State of New York, ARTHUR LEVITT, Comptroller of the State of New York, LaVERNE S. GRAF, Clerk of the County Legislature, County of Niagara, New York and KENNETH COMERFORD, County Clerk, County of Niagara, New York,
Appellees.

Appeal from a Three Judge Court of the United States District Court for the Western District of New York.

BRIEF OF APPELLEES CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC. and FRANCIS W. SHEDD, individually and on Behalf of All Others Similarly Situated.

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Appellees.

BRIEF OF APPELLEES

Jurisdiction

The jurisdiction was properly stated in the appellant's brief except on the subject of the remand by this Court. The cause was remanded on October 6, 1975 for reconsideration in light of the provisions of the new Charter adopted by Niagara

County in 1974 (A. 161). On October 8, 1975, the District Court heard argument of counsel and a 1974 County Charter and the official record of the vote cast for the 1974 Charter was made part of the record in the cause (A. 70, 128). On October 23, 1975, the District Court filed a decision and made specific findings amending the judgment of January 9, 1975 so that the 1974 Charter, which superseded the 1972 Charter, is in full force and effect as the instrument defining the form of local government for Niagara County (A. 166). The reinstated and amended judgment was granted on December 15, 1975.

Questions Presented

1. Whether creation of dual voting units of unequal population within a single political subdivision of a state, having general governmental powers, consisting of the voters of the cities of a county and the areas outside of the cities, and the concomitant requirement of separate majorities in each unit for adoption in a county-wide referendum of a county charter form of local government, so dilutes and debases the rights of the county-wide majority as to violate the one man, one vote principle.

2. Is the creation of separate voting units of unequal population within a single political subdivision having general governmental powers, based upon the place of residence, within the cities of a county considered as one unit and in the area outside the cities of a county considered as a separate unit, in which no specific group of voters were primarily interested or affected as compared to any other group, an inherently suspect classification for voting purposes which requires the State to furnish justification under strict scrutiny, that such constitutional and statutory

provisions are necessary to promote an articulated state goal, which classification is based upon a compelling state interest?

3. Does the creation of separate classifications of voters, consisting of voters of the cities of a county considered as one unit and the voters in the area of a county outside of cities, in a unit of local government having general governmental powers over the entire geographic area, in which no specific group of voters was primarily interested or affected as compared to any other group, restrict the franchise to vote in violation of the Fourteenth Amendment?

4. Did the District Court properly interpret the remand of October 6, 1975 from this Court and has the appellant preserved the right to raise such question on this appeal?

5. Whether dismissal of a prior action brought in the District Court by the County of Niagara, as the party plaintiff, purportedly on behalf of its citizens and voters against the State of New York which raised substantially the same issues as raised herein, constitutes a bar to the instant class action by aggrieved voters under the doctrine of *res judicata*. Whether the defense in bar of *res judicata* may be raised in this Court by the appellant who was not a party to the prior action.

Statement of Case

The County in New York State is a general unit of local government. Article 9 of the New York Constitution, the local government article, which was adopted in 1963, contains a provision, Article 9, § 1(h)(1), for the adoption of an alternative form of county government commonly known as a County Charter form, which primarily converts county

government from a single branch legislative form of local government to an executive-legislative form. The provision applies to all areas of the State other than New York City and contains the requirement that no such form of government, or amendment thereof, shall become effective unless approved on a referendum by a majority of the votes cast in the area of the county outside the cities and in the cities of the county, if any, considered as one unit. On September 6, 1972, the Niagara County Legislature adopted a Niagara County Charter, the express purpose of which was the separation of the County Legislative and Executive functions and responsibilities; the securing of the greatest possible County Home Rule, and the accomplishment of increased efficiency, economy and responsibility in the Niagara County government (A. 19). It was alleged by the plaintiffs-appellees in their complaint and amended complaint and admitted by the County defendants-appellees in their answer to the complaint that no specific group of voters, residents or other persons was primarily affected or interested as compared to another group of voters (A. 12, 36, 54), (The County defendants-appellees did not answer the amended complaint). By the express terms of the Charter, no function, facility, duty, or power of any city, town, village, school district or other district was to be transferred, altered or impaired by the Charter (A. 27).

On November 7, 1972, the proposed Charter was voted upon by the voters of the entire geographical unit, the County of Niagara. It received a majority vote in the County as a whole and in the cities of the County as a unit, but it did not receive a majority vote in the towns of the County, the area outside the cities of the County. Therefore, it was not certified as the duly adopted form of local government for Niagara County.

The population of the cities of Niagara County as a unit is 147,026. The population of the area outside the cities is 88,694 (A. 34). In the 1972 referendum, a total of 55,393 votes were cast. 11,594 negative votes were cast in the towns of Niagara County, 20.93% of the total vote, which minority vote prevented the adoption of the Charter (A. 12).

In December 1972, an action was commenced in the U. S. District Court for the Western District of New York entitled *County of Niagara vs. State of New York* in which the plaintiff was represented by the Niagara County Attorney (A. 172). On April 3, 1973, an order dismissing that action was granted (A. 178). On May 1, 1973, the plaintiff-appellee Shedd requested the Niagara County Legislature, in session, to appeal the dismissal of that action, to preserve it, to give him an opportunity to intervene or commence a separate action as a voter and on behalf of all other voters throughout the County who voted in favor of the Charter. The Niagara County Legislature refused the request of Mr. Shedd (A. 183-185). On May 4, 1973, the present action was commenced by Shedd individually and as a class action on behalf of aggrieved voters.

The order for a three judge District Court was granted on April 24, 1974. The case was heard by the three judge District Court on June 20, 1974. The decision was rendered on November 22, 1974 (A. 130).

In the interim, on August 20, 1974, the Niagara County Legislature adopted a 1974 Niagara County Charter subject to a referendum on November 5, 1974 (A. 70). The proposed 1974 County Charter expressly superseded any prior local law in the event of an inconsistency or conflict (A. 73) and by its

terms, no function, facility, duty or power of any city, town, village, school district or other district was to be transferred, altered or impaired by the 1974 County Charter (A. 73).

In the referendum of November 5, 1974 the voters of the entire geographical unit of general government, the County of Niagara, participated. The Charter received a majority vote in the County as a whole and in the three cities of the County as a unit but it was defeated by the class of voters in the area outside the cities of the County (A. 128, 129). In 1974, 36,808 votes were cast in the referendum. 8,222 negative votes were cast in the area outside of the cities of Niagara County, 22.33% of the total vote, which minority vote prevented adoption of the Charter.

On January 9, 1975 a judgment was granted declaring the constitutional rights of the voters of Niagara County pursuant to the guarantee of equal suffrage contained in the Fourteenth Amendment of the United States Constitution. The 1972 Charter was given full force and effect as the instrument defining the form of local government for Niagara County.

The Secretary of State of the State of New York certified the 1972 Charter as the form of local government for Niagara County. This action the District Court had enjoined. On February 28, 1975, the Secretary of State also certified the 1974 Charter as an independent act (Record-¶ 28, app. petition in State Court proceeding). The Niagara County Legislature and the Niagara County defendants-appellees, on advice of the County Attorney, decided there was an opportunity to implement the 1974 Charter, which had not been the subject of a judgment declaring the double majority provision of the New York Constitution in violation of the

Fourteenth Amendment. The County Attorney contended the judgment of January 9, 1975 had become moot. The appellant sought a determination that the judgment of January 9, 1975 was moot and a reversal of that entire judgment.

On October 6, 1975 this Court vacated the judgment of January 9, 1975 and remanded the cause to the District Court for reconsideration in light of the provisions of the new Charter adopted by Niagara County in 1974 (A. 161). On October 8, 1975, the District Court heard arguments of counsel and received the 1974 Charter and the official canvass of the vote upon the 1974 Charter as exhibits (A. 70, 128). On October 23, 1975, the District Court rendered a decision reinstating the earlier judgment and amending it to give the 1974 Charter full force and effect as the instrument defining the form of local government for Niagara County. Judgment was entered thereon on December 15, 1974 which judgment also denied the motion of the plaintiffs-appellees to amend the amended complaint. A notice of appeal was filed on December 18, 1975. The appellant did not appeal from that portion of the judgment denying the motion of the plaintiffs-appellees to amend the amended complaint.

In its statement of facts, the appellant is inaccurate as to certain facts which, we believe, should be corrected. In the case of the settlement of the January 9, 1975 judgment which implemented the 1972 Charter, when the plaintiffs-appellees moved to settle that judgment, the Niagara County attorney requested in a letter to the District Court a stipulation that the judgment apply to the 1974 Charter (Record and Appendix A-P. 10 of motion to affirm, plaintiffs-appellees, April 1976). On the return of the motion to settle the judgment, the plaintiffs-appellees, in open Court, agreed to stipulate, but the At-

torney-General of the State of New York refused to enter into a stipulation and there being no motion before the Court on the subject or an appropriate application, the Court made no determination of such issue and granted the judgment prepared by the plaintiffs-appellees.

The appellant is also inaccurate that the plaintiffs-appellees concurred that the 1974 Charter should be implemented, rather than the 1972 Charter, without authorization of the District Court.

At all times, the plaintiffs-appellees urged the District Court and the County officials of Niagara County that the judgment of the District Court must be specifically complied with. A motion for further injunctive relief in furtherance of the District Court's judgment was made by the plaintiffs-appellees on August 20, 1975 and was undecided when the remand by this Court occurred on October 6, 1975 (A. 150-160). The plaintiffs-appellees then expanded such motion to include a prayer for relief to amend the amended complaint to add a cause of action pertaining to the 1974 Charter, which motion was denied (A. 162-170).

THE ARGUMENT

I. The election at issue herein is one for a form of government in a unit of local government, having general governmental powers, in which no group of voters has any special interest.

The nature of county government in New York State and the rights, privileges, functions and duties to be conferred upon such government upon the adoption of a County Charter are set forth in the County Charters which are contained in the appendix (A. 19 *et seq.*, 70 *et seq.*) and the complaint and amended complaint of the plaintiffs-appellees (A. 12-13, 53-54).

That the proposed Charter of County government is to serve all the voters, citizens and residents of the entire geographic area of the County uniformly and that no specific group is primarily affected or is specially interested is clear from the Charters. The plaintiffs-appellees alleged such ultimate facts in each of their complaints (A. 12, 54). The County defendants-appellees admitted the allegations (A. 36). The State defendants-appellees denied the allegations but did not plead affirmatively any facts to identify or justify any group or class of voters having a special interest, either in their answer or by any evidence in this cause (A. 66 *et seq.*). The Attorney-General of New York did contend, in effect, in the District Court that residence in the cities or in the area outside the cities of a county *per se* constituted a constitutionally permissible special interest.

The appellant contends in this Court that city residence and town residence, the area of the county outside the city, in New York State, being in all instances divided into towns, is a suf-

ficient justification per se for the State of New York to create separate classifications of voters that should be upheld (App. br. p. 25-33).

Thus the record to justify the restriction on the franchise consists solely of the text of the New York Constitution, Art 9, § 1 (h) (1), 2 McKinney's Consolidated Laws of New York, P. 509 and its statutory implementation, § 33 (7) Municipal Home Rule Law, 35c McKinney's Consolidated Laws of New York, P. 70.

The classification restricts the franchise of a class of voters without the justification of a compelling state interest, which is a disfranchisement that was struck down in *Kramer vs. Union Free School District* 395 U. S. 621, 89 S. Ct. 1886 (1969); *Cipriano vs. City of Houma* 395 U. S. 701, 89 S. Ct. 1897 (1969) and *Phoenix vs. Kolodziejski* 399 U. S. 204, 90 S. Ct. 1990 (1970). It is the dual box voting procedure rejected in *Hill vs. Stone* 421 U. S. 289, 95 S. Ct. 1637 (1975).

The classification constitutes a dilution or debasement of the franchise by unequal citizen population units, as well, and a dilution of equal voting power which was found defective in *Gray vs. Sanders*, 372 U.S. 368, 83 S. Ct. 801 (1963), in *Reynolds vs. Sims*, 377 U. S. 533, 84 S. Ct. 1362 (1964) and in *Avery vs. Midland County, Texas* 390 U.S. 474, 88 S. Ct. 1114 (1968).

In the Niagara County referenda for the proposed Charters, 20.93% of the town voters blocked the adoption of the Charter in 1972 and 22.33% of the town voters blocked the adoption of the Charter in 1974 under the New York voting scheme. In New York State, using the residence statistics contained as an exhibit to the complaint (A. 33-35) as a

measurement, a minority of 2% of city voters in the City of Long Beach in Nassau County could block a County Charter. Theoretically, one negative vote in one of the voting units could defeat the favorable vote of the other unit of voters.

From either viewpoint, that of city voter or town voter, this is a fencing in or fencing out of a class of voters because of the way they may vote and is unconstitutional. *Carrington vs. Rash* 380 U. S. 89, 85 S. Ct. 775 (1965).

II. It is the election franchise that is the fundamental right, entitled to protection. The purpose of the election is secondary.

In the District Court opinion of November 22, 1974, the Court stated that the precise issue herein appeared to be one of first impression (A. 139).

Although prior cases may not have specifically dealt with a referendum to decide the form or structure of local government, the issue is that of the impact or restriction on the franchise. There is no valid reason why constitutional distinctions should be drawn on the basis of the purpose of the election. *Hadley vs. Junior College District of Metro, Kansas City* 397 U. S. 50, 54, 90 S. Ct. 791, 794 (1970). As this Court expressed the standard in *Hill vs. Stone* 421 U. S. 289, 95 S. Ct. 1637 (1975):

> "The basic principle expressed in these cases is that as long as the election in question is not one of special interest, any classification restricting the franchise on grounds other than residence, age and citizenship cannot stand unless the district or State can demonstrate that the classification serves a compelling state interest."

In *Avery vs. Midland County, Texas* 390 U. S. 474, 88 S. Ct. 1114 (1968), the facts involved representation in local government and the right of the aggrieved voters to a vote of substantially equal weight to the vote of every other resident. But the division on the Court seems to have involved a consideration of the impact upon the structure of local government. The Court specifically held:

> "Our decision today is only that the Constitution imposes one ground rule for the development of arrangements of local government: a requirement that units with general governmental powers over an entire geographic area not be apportioned among single member districts of substantially unequal population." (390 U.S. at p. 485, 88 S. Ct. at P. 1121)

The County Charter form of local government constitutes a development of an arrangement of local government. The Court in *Avery* emphasized that its decision would not bar the emergence of new structures for local governments.

That the Court in *Avery* recognized that its extension of the protection of the franchise to local government would be applicable to the adoption of new forms and structures of local government appears likely from a comparison of the majority opinion and Justice Harlan's dissenting opinion. The dissent seems to predict that functional, area wide, county wide government will not be achieved unless the barriers between city and suburb are maintained to facilitate compromise. The barriers and the fences have remained up another decade and the dual box, the double majority, voting schemes have not brought about compromises. To the contrary, they have raised the barriers. The implementation of Fourteenth Amendment rights, we suggest, can bring about more com-

promise and more progress that invidiously discriminatory dilution or debasement of equal suffrage could ever accomplish.

III. The restriction upon the franchise, justified by the appellant to prevent encroachment by city and town voters on one another, cannot stand.

In his brief, the appellant speaks of "important practical differences between the governmental needs of these two differing types of residents." (App. br. p. 30). He uses the terms home rule and protection of grass roots government from encroachment by larger subdivisions (App. br. p. 25). What the differences are, the appellant does not explain. What the alleged differences are, that would not offend greviously fundamental constitutional rights, the record does not disclose.

His facts are wrong, if as the defender of the towns, he is playing the role of David, because the population of the towns in New York State exceeds the city population in 32 of the 36 counties in New York which contain cities, although in Niagara County the town population does not (A. 34, 35).

The word encroachment, to describe the position of the appellants, fits. Encroachment is an old English territorial word meaning to trench, or to intrude, by invidious or gradual advances upon the territory of another. *Oxford English Dictionary,* (1971). The fencing in or out description of restrictions on the franchise by this Court in several earlier cases does not seem adequate to describe the invidious discrimination of a classification of this nature.

The appellant depicts New York State as consisting of cities and towns upon which County government is to be superimposed by the proposed County Charter. In reality, the County is the earliest unit of general purpose local government in New York State. The County unit came into being in 1683. In 1777, the Counties of the State were divided into towns. 11 McKinney's Laws of New York, County Law ps. IX *et seq.*, historical note; 61 McKinney's Laws of New York, Town Law, ps. VII, XI Early History of Town Government.

In addition, the County Charter form of local government, with adoption thereof to be brought about by a simple majority of the voters of the County, has been advocated by the most distinguished experts on the subject of local government in New York State as the appropriate means of providing effective and accountable local government in New York State, particularly in the urban counties. Proceedings of the 1967 Constitutional Convention of the State of New York, Vol XII, Index P. 35, Proposed Constitution Art XI, § 1 i(1); Debates, Proposition 1383-B, Proceedings, *supra* Vol. III, p. 572-607. See also the report of the New York State Temporary State Commission on the Constitutional Convention, (1967) Vol. 13, Local Government. The vote in favor of the proposition providing for majority approval upon a referendum for a County Charter was unanimous, Proceedings, *supra,* P. 607. The proposed Constitution, which contained numerous controversial provisions, was submitted to the electorate as a single item and was defeated.

In attempting to justify the dual box voting scheme in Point II of his brief, the appellant is inaccurate in several respects. He contends that city voters have a majority of 10.5 million city residents as against 7.5 million town residents in New

York State to repeal Article 9 § 1 (h) (1). But he overlooks the fact that this provision of the New York Constitution does not apply to counties wholly contained in a city, which means the five counties of the City of New York (App. br. p. 31). Approximately 8 million New York City residents should be subtracted, leaving 2.5 million city residents and 7.5 million residents of the area outside the cities, who are effected by the double majority provision.

The appellant persists in alleging that the proposed County Charter realigns and transfers existing governmental functions and prerogatives from the towns and the cities of the County to the proposed form of County government (App. br. p. 32). Both the 1972 and 1974 County Charters expressly guarantee that no function, facility, duty or power of any city or town of the County shall be transferred, altered or impaired by the proposed Charters:

> "No function, facility, duty or power of any city, town, village, school district or other district or of any officer thereof is or shall be transferred, altered or impaired by this charter or code." (A. 27, 73.)

IV. The dual box restriction on the franchise does not meet the stringent test of justification; that it is necessary to promote an articulated state goal and must constitute a compelling state interest.

The above test was described in *Kramer vs. Union Free School District,* 395 U. S. 621, 89 S. Ct. 1886 (1969) and in subsequent cases. It is applicable here. Although in virtually every case of a voting inequality or classification, the government unit that has established a deviation from a single unit, numerically equal voting scheme has attempted to

show some rational basis therefor, the appellant argues herein that where the voters live in the county may determine the value of their voting franchise.

Gray vs. Sanders, 372 U. S. 368, 83 S. Ct. 801 (1963) was intended to put an end to that argument with the following language:

> "Once the geographical unit for which a representative is to be chosen is designated all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of 'We the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications."

Eight years later in *Gordon vs. Lance*, 403 U. S. 1, 4, 91 S. Ct. 1889, 1891 (1971) the Chief Justice stated the holding in Gray as follows:

> "The defect this Court found in those cases lay in the denial or dilution of voting power because of group characteristics—geographic location and property ownership—that bore no valid relation to the interest of those groups in the subject matter of the election."

The appellant having failed to demonstrate that the classification into city voters and other than city voters, has any basis other than to classify voters based upon where they choose or happen to live, the classification may not stand and the judgment of the District Court should be affirmed.

V. The Sovereignty argument of the appellant is irrelevant.

The issue in this case is not whether a state has any obligation to extend voter participation to units of local government. The issue is the right of suffrage when the State chooses to permit voter participation in local government.

***Avery vs. Midland County, Texas*, 390 U. S. 474, 88 S. Ct. 1114 (1968) extended the protection of the right of equal suffrage to the area of local government and prohibited the restrictions upon the franchise which the appellant defends.**

The method by which the appellant attempts to extricate himself from *Gomillion vs. Lightfoot*, 364 U.S. 339, 81 S. Ct. 125 (1960), after reciting that the circumvention of a federally protected right is a limitation on state power, is ingenious but is all semantics.

In *Sailors vs. Board of Education*, 387 U. S. 105, 87 S. Ct. 1549 (1967), he overlooks the fact that the state had not extended voter participation to the local government unit and that, at least as to non-legislative local officers, the State had the right to decide whether to appoint or elect them.

VI. The argument by appellant from previous cases, that the dual majority scheme is not offensive to equal protection, is not supported by those cases.

He begins his argument by urging that the New York Constitution was adopted by a majority of all the voters of New York and the New York Legislature is fairly representative of all the people (App. br. p. 25). Such facts are immaterial to the issue before this Court. In *Lucas vs. Forty-Fourth General Assembly of Colorado*, 377 U. S. 713, 736, 84 S. Ct. 1459, 1474 (1964) this Court wrote:

> "A citizens constitutional rights can hardly be infringed simply because a majority of the people choose that it be."

The principle was adopted in *Avery vs. Midland County, Texas,* 390 U. S. 474, 481, 88 S. Ct. 1114, 1118 (1968) and in *Kramer vs. Union Free School District No. 1* 395 U. S. 621, 628, 89 S. Ct. 1886, 1890 (1969).

The appellant cites *Gordon vs. Lance,* 403 U.S. 1, 91 S. Ct. 1889 (1971) but the reliance is misplaced. The classification of voters into identifiable classes, city voters and other than city voters, is the kind of classification that *Gordon* called discriminatory. In *Gordon,* this court emphasized the soundness of *Gray vs. Sanders,* 372 U. S. 368, 83 S. Ct. 801 (1963), and said the defect lay in the dilution or debasement of voting power because of group characteristics, geographic location and property ownership, and the fact that votes were discarded solely because of where they were cast, all of which violated the equal protection clause.

The appellant then calls up *Dusch vs. Davis,* 387 U. S. 105, 87 S. Ct. 1549 (1967) to support his argument. The *Dusch* opinion, to the contrary, condemns the invidious discrimination of classifying voters based upon their race, their sex, their economic status or their place of residence, virtually all of which forms of discrimination are implicit by encircling the cities. The Court found no fault with requiring district councilmen to reside in each of their seven districts, because they were voted for citywide. They were city councilmen just as the voters of Niagara County were all county voters and the representatives they would elect, pursuant to the proposed County Charters, would be county officials.

Finally the appellant cites *Salyer Land Company vs. Tulare Lake Basin Water Storage District,* 410 U. S. 719, 93 S. Ct. 1224 (1973). This is a special interest or special purpose case wherein equal suffrage was held to be inapplicable because the Tulare Lake Basin Water Storage District was not a unit of general purpose government, such as Niagara County. It is, not only, not authority for the appellant's plea, but Justice Rehnquist in describing what is not justification for restricting the franchise, establishes the case for the conclusion that the equal protection clause is offended by Article 9 § 1 (h)(1) of the New York Constitution and its statutory implementation.

The dual voting box, the double majority of the New York Constitution is an insidious restriction upon the franchise which violates the right of equal suffrage guaranteed by the Fourteenth Amendment and the scheme should not stand.

VII. The remand of this Court was carried out properly by the District Court.

The responsibility of the District Court was to obey the mandate of the remand. *Briggs vs. Pennsylvania R. Co.,* 334 U. S. 304, 68 S. Ct. 1038 (1948). The decision as to the method of proceeding was in the sound discretion of the District Court. *Epstein vs. Goldstein,* 110 F. 2d. 747 (CA 2d Cir. 1940); *5A Moore's Federal Practice,* ¶52.13, p. 2765 (1975); *6A Moore's Federal Practice,* ¶59.16 p. 59-294 (1975).

On October 8, 1975 the District Court conducted a hearing. The 1974 Charter and the statement of the Board of Convassers of Niagara County in relation to the votes cast for the 1974 County Charter were made exhibits in the record (A. 70, 128). Counsel for the appellant and counsel for all other par-

ties admitted the two Charters were substantially the same (A. 165). The District Court perused the two Charters (A. 165) and made the decision that the declaration of the plaintiffs-appellees fundamental constitutional rights should be enforced by ordering the 1974 Charter to be in full force and effect as the instrument defining the form of local government for Niagara County.

The District Court properly exercised its jurisdiction pursuant to the remand from this Court.

The appellant's contentions, that the District Court did not interpret properly the remand and that the remand was solely for the purpose of determining the issue of mootness, do not appear to have any merit nor has such objection, if it has any merit, been preserved adequately.

The remand appears clear by its terms and authorizes the District Court's action which was granted in the judgment of December 15, 1975.

Secondly, the practice seems to be that if there is an issue of the proper interpretation by the lower Court of a remand, that such issue should be the subject of a clarificatory motion in the appellate court. *6A Moore's Federal Practice*, ¶ 59.16, p. 59-294 (1975).

Thirdly, the appellant had the opportunity and responsibility to preserve his point that the District Court had no authority pursuant to the mandate to implement the 1974 Charter, by appealing from the District Court's order denying the plaintiffs-appellees' motion to amend the amended complaint. The appellant did not appeal from that portion of the judgment of December 15, 1975. We urge that the appellant has thereby precluded itself from questioning the decision of the District Court to exercise jurisdiction over the 1974 County Charter.

VIII. *Res Judicata* is not a good defense.

The decision and reasoning of the District Court, that the plaintiffs-appellees, the aggrieved class of voters in this cause, were not parties nor in privity in the first action; that the requirements of a class action were not met nor was it clear they could have been met as to adequate representation or adverseness of interest if tested; that the standing of the County of Niagara to bring an action on behalf of an aggrieved class of some of its citizens and voters in a case of this nature is not clear; is well substantiated and should not be disturbed by this Court (A. 136-138).

In addition, the refusal of the Niagara County Legislature upon the request of the plaintiff-appellee Shedd, to appeal the judgment of dismissal in the prior action before it became final, or to obtain an extension of the time to appeal to give the plaintiff-appellee Shedd the opportunity to intervene in the prior action, is probative on the ability of the County to adequately represent the aggrieved voters on this issue and to have the necessary adverseness of interest. The claim of the appellant that the plaintiffs-appellees made no effort to appeal or intervene is inaccurate (A. 134, 183-184).

On May 1, 1973, Mr. Shedd appeared before the Niagara County Legislature and requested it to act as to protect the constitutional rights of the citizens of Niagara County who voted for the 1972 Charter. The County Legislature refused. The event was reported in the local press on May 2, 1973 (A. 185). The judgment of dismissal in the prior action became final on May 3, 1973.

Finally, the defense of *res judicata* is asserted in this Court only by the intervenor-appellant. The appellant was not a party to the prior action, nor do we believe that any case could be made that it had any right of privity in that action. The appellant has failed to demonstrate that it has any rights stemming from the dismissal of that complaint. The appellant's non-party status in the prior action should preclude the appellant from asserting the defense of *res judicata.*

IX. There is no reason for not giving the aggrieved voters the benefit of their fundamental constitutional rights retroactively.

From the beginning, as aggrieved voters have established the infringement upon their fundamental constitutional right of equal suffrage, they have been given full equitable relief. *Baker vs. Carr* 369 U. S. 186, 250, 82 S. Ct. 691, 727 (1962); *Reynolds vs. Sims,* 377 U.S. 533, 585, 84 S. Ct. 1362, 1393 (1964).

The cases cited by the appellant, *Cipriano vs. City of Houma,* 395 U. S. 701, 89 S. Ct. 1897 (1969) and *Phoenix vs. Kolodziejski,* 399 U. S. 204, 90 S. Ct. 1990 (1970) involved bond elections in which retroactivity would have damaged the credibility of municipal bonds and required that the fundamental constitutional rights should only be applied prospectively.

There is no sufficient reason for this Court not to give the plaintiffs-appellees, the aggrieved class of voters, the full benefit of their franchise once their fundamental constitutional rights are finally established.

X. The mootness and jurisdiction arguments of the appellant are irrelevant.

The remand by this Court on the subject of the 1974 Charter became the law of the case and the antecedent events should have no further relevance. The issue of the proper interpretation of the remand by the District Court has been discussed in Point VII herein.

There is in this portion of the appellant's brief (IV and V) the repeated assertion that the plaintiffs-appellees abandoned the 1972 Charter between the January 9, 1975 judgment and the October 6, 1975 remand by this Court. The assertions have no relevancy to the legal issues herein but we believe the contention should not stand unanswered.

At all times, the plaintiffs-appellees urged the District Court and the Niagara County officials that the District Court judgment of January 9, 1975 must be complied with and that any deviation from it could only be with the approval of the District Court. Finally on August 20, 1975, after the County Clerk of Niagara County failed to comply specifically with the District Court's judgment, the plaintiffs-appellees moved for further injunctive relief in furtherance of the judgment of January 9, 1975 pursuant to Rule 62 (c) *Federal Rules of Civil Procedure* (A. 150-160).

The foregoing may only bear upon whether the class of aggrieved voters have at all time acted responsibly and forthrightly to protect and enforce their fundamental constitutional right of equal suffrage, but we believe that it is a principle upon which this Court should not have a mistaken impression.

CONCLUSION.

The judgment of the District Court granted on January 9, 1975, as reinstated and amended by the judgment granted on December 15, 1975, should be affirmed.

Respectfully submitted,

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